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IN THE

Supreme Court of the United States

637

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1960.
No. .....

LOS ANGELES HOTEL-RESTAURANT EMPLOYER-UNION WELFARE FUND,

Petitioner,

vs.

WILLIAM N. BOWIE, JR., Trustee in Bankruptcy.

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Trustees of the Los Angeles Hotel-Restaurant Employer-Union Welfare Fund hereby petition the Supreme Court of the United States for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinions Below.

The Memorandum Opinion of the Referee in Bankruptcy (Appendix, *infra*, pp. 1-5) is unreported. The District Court rendered no opinion, but merely affirmed the order of Referee in Bankruptcy. [Tr. 105-106.] The Per Curiam Opinion of the Court of Appeals (Appendix, *infra*, p. 7) is reported at ..... F.2d .....

Jurisdiction.

The judgment of the Court of Appeals was entered on November 4, 1960. (Appendix, *infra*, p. 8.) The jurisdiction of this Court is conferred by 28 U. S. C. 1214(1) and 11 U. S. C. 27.

Question Presented.

Are contributions, which have been wholly derived from the employee wage-package, and which have been assigned by the bankrupt's employees to an employer-union welfare trust, entitled to priority as "wages . . . due to workmen, servants, clerks . . ." within the meaning of Section 64(a)(2) (Title 11 U. S. C. 104) of the Bankruptcy Act?

Statute Involved.

Section 64(a)(2) of the Bankruptcy Act, as amended. (Title 11 U. S. C. 104) provides as follows:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; . . ."

Statement.

The bankrupt, Alfred Marks, individually, and as a member of the Restaurant Employers Council of Southern California, entered into three collective bargaining agreements with the Los Angeles Joint Executive Board of Hotel and Restaurant Employees and Bartenders Unions, AFL. These contracts required the bankrupt to pay to the Los Angeles Hotel-Restaurant Employer-Union Welfare Fund the sum of eight cents (8c) per hour for each hour worked by his employees. These contracts were in full force and effect on the date the Petition in Bankruptcy was filed, and for the three months prior thereto. No payments for this three-months period had been made by the bankrupt prior to the initiation of the bankruptcy proceedings, nor thereafter by either the bankrupt or the Trustee in Bankruptcy. [Tr. 96-97, Finding III.] The payments owed by the bankrupt, under these contracts, did not exceed $600 to each employee.

The Welfare Fund Trust is the duly constituted collection agent for both the Los Angeles Hotel-Restaurant Employer-Union Retirement Fund and the Los Angeles Hotel-Restaurant Industry Emergency Relief Fund. The total rate of contribution to all three Funds is eight cents (8c) per hour. [Tr. 98, Finding V.]

The Los Angeles Hotel-Restaurant Employer-Union Welfare Fund provides hospital, surgical, dental and medical care to eligible employees and their dependents. This Fund also provides life insurance on the lives of employees and their dependents. Eligibility is based upon registration for work at the office of the Union and the minimum work period. Eligibility is not re-

stricted to union members only. Any employee of the bankrupt need only register and work the minimum number of hours to gain eligibility. [Tr. 97, Finding IV.]

The Los Angeles Hotel-Restaurant Employer-Union Retirement Fund provides additional retirement income to those receiving Federal Old Age Benefits. As is true with the Welfare Fund, union membership is not a condition to participation in this program. [Tr. 97.]

The Los Angeles Hotel-Restaurant Industry Emergency Relief Fund provides to eligible employees certain benefits not available under the health or retirement programs. These include: Financial Aid to Persons Awaiting Public Assistance, which provides assistance to tide the destitute employee over the waiting period before public agency benefits are available; Disability Loan, which provides relief similar to state disability insurance during the interim period between the employee's filing a claim with the State, and the actual receipt of payment from the State; Home Nursing Care, which provides that benefit to those indigents suffering from physical disability not serious enough to require hospitalization; and Prescribed Medication, which provides prescribed drugs and medicines for those financially unable to afford the purchase price of such drugs or medicines. [Tr. 98.]

ALL contributions to Appellant's trust fund arose out of and were part of increases negotiated pursuant to the annual WAGE reopening provisions of the industry contracts between the Union, and the bankrupt and other employers. [Tr. 98, Finding VII.] On the occasion of each wage increase during the period 1950 to 1959, all or part thereof was assigned by the employees

collective bargaining agent (The Union) to the Appellant Trust Fund.

All payments to Appellant Trust Fund are measured by hours worked by the Bankrupt's employees. [Tr. 99, Finding IX.]

On the occasion of each wage renegotiation, the contract, as executed by the Union, was approved and ratified by the Bankrupt's employees. [Tr. 99, Finding X.]

All payments to the Fund were agreed by the parties to be part of the wage package. [Tr. 70; Finding XI, Tr. p. 100.]

Reasons for Granting the Writ.

This honorable Court, on March 9, 1959, rendered its decision in *United States v. Embassy Restaurant, Inc.*, 359 U. S. 29, 79 S. Ct. 554, 3 L. Ed. 2d 601, denying priority status to welfare fund contributions as wages due to workmen under Section 64(a)(2) of the Bankruptcy Act (Title 11 U.S.C. 104).

In seeking this writ, Appellant believes that the Court of Appeals erred in applying the *Embassy* decision to the facts in the case at bar.

There are two questions: Are the payments wages? Are they due to workmen?

Are the Payments Wages?

With respect to the first question, "Are the payments wages," the Supreme Court in *Embassy* discussed five factual criteria which distinguished the payments due in *Embassy* from what the Supreme Court obviously felt were "wages":

(1) The sums involved in *Embassy* were "flat sums . . . per month for each workman." (359 U. S. 32.)

(2) *Embassy* contributions were "without relation to hours, wages or productivity." (359 U. S. 32.)

(3) The parties to the *Embassy* contract did not consider the contributions as wages. (359 U. S. 32-33.)

(4) The contributions "offer (ed.) no support to the workmen in periods of financial distress." (359 U. S. 33.)

(5) Title to the trust funds was in the Trustees and not in the worker.

The facts in the case at bar, as to each of the criteria designated as (1), (2) and (3), above, are diametrically opposite to the facts in *Embassy*. Here the payments were tied into the unit of work—each hour worked was required to be paid for by an additional payment to the Appellant Fund. [Tr. 96, Finding III.] The payments were measured by hours worked by each employee. [Tr. 99, Finding IX.] Contrary to the facts in the *Embassy* case, the parties to the collective bargaining agreement did and still do consider the contributions to the Fund as part of the wage package, that is, part of wages or compensation for hours worked. The parties in the case at bar did not try to prove this fact by reference to what industry and labor *thought about* these kind of payments generally, nor by reason of their having been bargained for collectively as contended by appellant in *Embassy*. The collective bargaining agreements upon which Appellant relies pro-

hibited negotiations, except on the issue of wages. The parties stipulated as follows:

> "All contributions and increases thereto to the Welfare Fund have arisen out of wage renegotiation. The Employers Council, as well as the Union, consider these contributions to be part of this wage package" [Tr. 70]:

Here was a specific and express stipulation of fact relating to what these payments were,—they were part of the wage package, they were negotiated as part of wages, they were earmarked as cost of living increases in the wage scale, they were derived exclusively from such costs of living increases in wages. [Tr. 32; 61-64; 70; 98, Finding VII.]

The fourth of the factual criteria which the Supreme Court mentioned in *Embassy* as pertinent (that the contributions offered no support to workmen in periods of financial distress), involves the basic purpose of the priority section, which is "to furnish distressed workers with a cushion of purchasing power against the impact of their employer's bankruptcy." *In the Matter of Victory Apparel Mfg. Corp.*, 154 Fed. Supp. 819, 822 D.C.N.J., 1957); *Blessing v. Blanchard*, 223 Fed. 35, 37 (9th Cir. 1915).

Nowhere, however, is such "support" defined.

In the case at bar, appellant Funds provided real and substantial support to workmen in time of financial distress due to their employer's bankruptcy by furnishing to the employee and his family, medical, hospital and surgical care, continued life insurance coverage, complete dental care, retirement payments, and a whole complex of emergency relief benefits specifically de-

signed to provide money in cases of individual family disaster, whether due to accident, illness or unemployment.

Are payments to such a Fund entitled to priority as wages under the fourth criterion?

We submit that they are, for three reasons:

(a) Part of the payments involved in the case at bar were to the Emergency Relief Fund, whose purposes were clearly to cushion the disastrous effects of sudden unemployment leaving the workman without ability to provide these benefits himself directly, and financial aid in bridging the gap between the termination of employment and receipt of public assistance. The *sole* purpose of Appellant's Emergency Relief Fund is to provide for such emergencies. A notable example of only one of the benefits offered by the Emergency Relief Fund is "Financial Aid for Persons Awaiting Public Assistance." In their resolution [Tr. 84] the Trustees of the Emergency Relief Fund said, "It is intended by this benefit to provide financial assistance to tide the Applicant over the waiting period *before* public agency benefits are available." (Emphasis supplied.)

(b) If the majority opinion of the Supreme Court in *Embassy* is interpreted to mean—which the Supreme Court does not specifically say,—that the purchase of medical, hospital and surgical care for the worker and his family during the period of his unemployment is not cushioning the hardship of unemployment, then the interpretation is clearly wrong and should be corrected.

(c) If the *Embassy* opinion is interpreted to mean (what again it does not say) that what a man does with his money determines whether it is wages or not,

then the interpretation is illogical and should be corrected. The Court must look at what a man does to *earn* the payment to decide whether it is wages, not what he does with the payment once he gets it.

Congress has never defined the meaning of "wages" as used in 64(a)(2) of the Bankruptcy Act.[1] The usual definition of "wages" under Section 64(a)(2) is "the agreed compensation for services rendered."[2] Payments to the Appellant trust in the case at bar have specifically been held by the California courts to be part of the employer payment owed to the worker for each hour worked. (*Klein v. Cross*, 156 Cal. App. 2d Supp. 858), which says: "The employer's obligation to pay is measured by the hours worked, not by the benefits an employee may receive." (at p. 859).

If these payments be part of the "agreed compensation" for the services rendered, they are and remain wages of the cook, waiter or bus boy, regardless of what he does with the money. They remain wages regardless of whether he uses the money to cushion the shocking disaster of unemployment by paying the rent, or by providing continued medical and surgical care and life insurance for his family, or by buying the wildest luxury item with the money.

The net effect of the decisions of the Referee, the District Court and the Court of Appeals in the case at bar is to interpret the majority opinion in *Embassy* to mean that "what a man does with his wages determines whether it's wages or not."

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[1]See 57 Mich. L. Rev. 403, 404; 17 Washington & Lee L. Rev. 117, 120.

[2]*In re Gigeroitz* (2d Cir. 1903), 121 Fed. 982; *In re New England Thread Co.* (1st Cir. 1907), 158 Fed. 788 at 792.

If this is what the majority of the Supreme Court meant, then deny certiorari. If this interpretation is wrong, as it is illogical, then grant certiorari and clarify what the Court means.

With respect to the fifth criteria, the Court in *Embassy* points out that the Trustees and not the worker have title to the trust funds. This is true here as it was in *Embassy*, but the trustees hold the money *as trustees* for the same purpose that the worker would if he held it himself. They hold it for his benefit.

Are the Payments Due to Workmen?

As to the second major question,—whether or not these payments are "due to workmen" (assuming they are wages) we are dealing with a simple problem of assignment. The validity of an assignment of wages is governed by state law, while the priority to be accorded a wage claim in the hands of an assignee is governed by the Bankruptcy Act. *In re Ross*, (D. C. Cal.), 117 Fed. Supp. 340. A present assignment of future wages under an existing employment contract is valid in California. (*Cox v. Hughes*, 10 Cal. App. 553, 102 Pac. 956; *Mann v. Moody*, 144 Cal. App. 2d 310, 301 P. 2d 28; California Labor Code, Sec. 300.) The facts at bar differ from *Embassy*. Here, the employer by contract with the employee (negotiated by his agent, the Union) agreed to compensate the employee for each hour he would work *in the future* partly by payment to the worker directly and partly to the worker's assignee, the Appellant Fund, which would provide the worker with greater benefits via mass purchasing power than the employee could purchase individually. The wage contract, itself, constituted a valid future as-

signment of part of the wage package. The obligation was *incurred* when the employer signed the wage contract. The assignment was concurrent with the incurring of the obligation.

The debt *accrued* and became payable only when the employee performed the hour's labor; even then the employer became obligated to pay (*i.e.*, the debt became due and payable partly to the worker and partly to his assignee, the Fund) at the end of the payroll period.

Under California law in the facts at bar the assignment, made concurrently with the incurring of the obligation, complies with the rule in *Embassy* and *Shropshire & Co. v. Bush* (204 U. S. 136, 27 S. Ct. 178, 51 L. Ed. 436). For at the very moment that the employer in the case at bar contracted to pay the agreed wage scale, he also accepted the employee's assignment to pay part of the compensation for future hours worked to the Appellant Fund.

Appellant respectfully submits that this court should state once and for all that *Shropshire* has not been overruled and that Appellant's Fund, and all other funds which meet the tests set forth above are entitled to priority under Section 64(a)(2) of the Bankruptcy Act.

Conclusion.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted.

DENISON, DIETRICH & ANDERSON,
By WALTER N. ANDERSON, and
JAMES N. ANDERSON,
Attorneys for Petitioners.

APPENDIX.

Memorandum by Referee.

United States District Court, Southern District of California, Central Division.

In Bankruptcy No. 88949-T.

In the Matter of Alfred Marks, dba Original Cohen's aka Cohen's Delicatessen Restaurant and Bakery, also dba Sam's Sandwich Shop, Bankrupt. William N. Bowie, Jr., Trustee, Objector, v. Los Angeles Hotel-Restaurant Employer-Union Welfare Fund, Claimants

(Filed June 19, 1959).

By David B. Head, Referee in Bankruptcy.

The claimant herein filed two claims based upon unpaid sums due them under collective bargaining agreements entered into between the bankrupt and the claimants. The trustee objected to the allowance of the claims with the priority of Sec. 64(a)(2) of the Bankruptcy Act. That section, in part, reads as follows:

> "The debts to have priority, in advance of the payment of dividends to creditors and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; and for the purpose of this clause, the term 'traveling or city salesman' shall include all such salesmen, whether or not they are independent contractors selling the products or services

of the bankrupt on a commission basis, with or without a drawing account or formal contract. . . ."

Three sets of stipulations have been entered into between claimant and trustee which fully cover the factual situation. From time to time collective bargaining contracts have been negotiated between the Restaurant Employer's Council of Southern California and the Los Angeles Local Joint Executive Board of Hotel and Restaurant Employees and Bartenders Union. Bankrupt was a member of the first group. From time to time these contracts have made provision for the payment of monies by the employers to the Los Angeles Hotel-Restaurant Employer-Union Welfare Fund. The trustees of this fund, and those of other subsidiary funds, are charged with providing hospital, surgical, dental, medical care, and retirement and financial relief for all employees of the contracting employers, whether members or not of one of the participating unions. A Retirement Fund and an Emergency Relief Fund were established and certain of the monies paid were allocated to these funds.

Factually, the situation differs but little from that under consideration in the case of United States v. Embassy Restaurant Inc. 359 U. S. 29. We are concerned only with the differences and whether or not these differences take us without the scope of that dicision so as to permit this court to reach a contrary opinion should it so desire.

In reversing the court below, the United States Supreme Court traced the history of wage priorities under the Bankruptcy Act and preceding legislation. It pointed out that the "contributions" made by the Employers were due to the trustees of the fund and that title thereto vested in the trustees to the exclusion of the employees. The argument that this fringe type of benefit was bargained for in the same manner as wages and therefore was, in fact, wages was rejected. The court emphasized that a statute was in question. The court distinguished its decision in Shropshire, Woodliff & Co. v. Bush, 204 U. S. 180, which concerned assignability of wages and U. S. v. Carter, 353 U. S. 210, which concerned interpretation of the Miller Act.

The substantial factual differences between this case and the Embassy case are found, first, in the measuring of payments and, second, in certain rights of action given to individual wage earners. The instant contract calls for the payment of a fixed sum for each hour worked by an employee, while in the Embassy case, the "contribution" was in a fixed monthly amount for each employee on the payroll regardless of time worked. In each case, the amount paid did not vest in the employee and there was no direct relationship between an employee's wage and the benefits received. The formula in each case was to fix the method of computing the amounts to be paid in. There is no difference here that would permit me to depart from the rule of the Embassy case.

In the contract (Agreement and Declaration of Trust, Sec. 4.05, Exhibit D to First Stipulation) it is provided, "The failure of any employer to make the required contributions hereinabove provided shall be deemed a breach of this Agreement by said Employer, and such Employer shall be personally and directly liable to each employee damaged by such failure, for whatever benefits such employee was denied because of the Employer's failure to make the required contributions, together with court costs and attorney's fees reasonably necessary in collecting such benefits from such Employer hereunder, unless said failure to pay such contributions or any part thereof is due to honest mistake or inadvertence, and such failure does not deprive any employee of the benefits to which he is entitled hereunder." The claimants argue that this creates a direct obligation due to the employee. Such is not the case. This section gives an employee a right to sue for damages resulting to him for the failure of the employer to make the payments under the contract. It gives him no right to sue for, or receive, the payments. His cause of action is based upon the wrongful act or omission of the employer and does not arise unless he is damaged.

Much of the argument of claimants appeals to the reader's sympathies. Bankruptcy is an economic disaster, the effects of which are borne and suffered by many groups. As the Supreme Court pointed out in the Embassy case, "The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the Bankrupt's estate. . . ." Kothe v. R. C. Taylor Trust,

280 U. S. 224, 227, and that "if one claimant is to be preferred over others, the purpose should be clear from the statute." I can find nothing in the points raised and ably argued by claimants that will take this case from under the rule of the Embassy case. The Bankruptcy Act has attempted to equitably fix priorities in the distribution of estates. We must follow the law as it is written and interpreted by our appellate courts. Only Congress can change it.

Trustee's objections to the priorities claimed are sustained and the claims allowed as general claims. Unless waived, counsel for trustee shall prepare, serve and file proposed findings of fact and conclusions of law, together with an appropriate order to be entered.[1]

Dated this 19th day of June, 1959 at Los Angeles, California.

DAVID B. HEAD,
Referee in Bankruptcy.

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[1]The findings of fact, conclusions of law, and Order of the Referee appear in the Transcript, pp. 95 to 101 inclusive.

Order Affirming Order of Referee in Bankruptcy Dated August 6, 1959.

In the District Court of the United States, Southern District of California, Central Division.

No. 88,949-T.

In the Matter of Alfred Marks, dba Original Cohen's aka Cohen's Delicatessen Restaurant and Bakery, etc., Bankrupt.

At Los Angeles, In Said District, On the 16th Day of February, 1960.

This matter came on to be heard on February 8, 1960, before the Honorable Ernest A. Tolin, United States District Judge, in his courtroom, Federal Building, Los Angeles, California, upon the petition filed by Los Angeles Hotel-Restaurant Employer-Union Welfare Fund to review the Order of Referee in Bankruptcy David B. Head, dated August 6, 1959, which said Order disallowed priority status to claims numbers 122 and 124 filed in the above bankruptcy proceeding. Petitioner appeared by and through its counsel, Denison, Dietrich & Anderson, by James H. Denison, Esq.; respondent Trustee in Bankruptcy appeared by and through his attorneys, Quittner, Stutman & Treister, by George M. Treister, Esq. The Court having considered the record on review, having heard the arguments of counsel, being fully advised in the premises and good cause appearing therefor,

Now, Therefore, the Findings of Fact and Conclusions of Law made and entered herein by the Referee in Bankruptcy under date of August 6, 1959, be, and the same hereby are, adopted as the Findings of Fact and Conclusions of Law of the reviewing District

Judge; and based upon said Findings of Fact and Conclusions of Law, it is

Ordered, that the Order of Referee in Bankruptcy David B. Head, dated August 6, 1959, and disallowing priority status to claims numbers 122 and 124, be, and the same hereby is, affirmed.

/s/ ERNEST A. TOLIN,
United States District Judge.

Affidavit of Service by Mail Attached.

(Endorsed): Lodged February 11, 1960. Filed February 16, 1960. Entered February 17, 1960.

Opinion of the Court of Appeals.

United States Court of Appeals for the Ninth Circuit. No. 16,876. Nov. 4, 1960.

Los Angeles Hotel-Restaurant Employer-Union Welfare Fund, Appellant, vs. William N. Bowie, Jr., Trustee in Bankruptcy, Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Barnes and Koelsch, Circuit Judges.

Per Curiam:

The judgment of the district court, affirming the order of the Referee denying priority as "wages due to workmen" of the claim of appellant Los Angeles Hotel-Restaurant Employer Union Welfare Fund is *affirmed* U. S. v. Embassy Restaurant, Inc., 1959, 359 U. S. 29.

(Endorsed) Per Curiam Opinion Filed Nov. 4, 1960.
Frank H. Schmid, Clerk.

Judgment of the Court of Appeals.

United States Court of Appeals, for the Ninth Circuit. No. 16,876.

Los Angeles Hotel-Restaurant Employer-Union Welfare Fund, Appellant, vs. William N. Bowie, Jr., Trustee in Bankruptcy, Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered: November 4, 1960.

Frank H. Schmid, Clerk.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 63

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vs.

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1960.

No. .....

LOS ANGELES HOTEL-RESTAURANT EMPLOYER-UNION WELFARE FUND,

Petitioner,

vs.

WILLIAM N. BOWIE, JR., Trustee in Bankruptcy,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION.

Question Presented.

Did the Court below correctly hold that employer contributions to union welfare funds are not entitled to priority treatment as "wages . . . . due to workmen," under Section 64a(2) of the Bankruptcy Act?

ARGUMENT.

No Important Federal Question Is Involved. The Decision Below Represents a Correct Application of the Principle Recently Established by This Court in the Embassy Restaurant Case.

This Court has established in *United States v. Embassy Restaurant, Inc.*, 359 U. S. 29, a decision rendered in 1959, that employer contributions owing under collective bargaining agreements to union welfare funds are not entitled to priority status in the employer's bankruptcy. The holding was that such contributions are neither "wages" nor are they "due to workmen," within the meaning of Section 64a(2) of the Bankruptcy Act.

The present case and *Embassy Restaurant* are indistinguishable. For this reason, the Referee in Bankruptcy, the reviewing District Judge and the Court of Appeals for the Ninth Circuit all denied Petitioner's attempt to obtain priority treatement for its claims.

Petitioner's welfare funds, as other union welfare funds generally, are organized "to maintain life insurance, weekly sick benefits, hospital and surgical benefits and other advantages" for the trust beneficiaries. (See 359 U. S. at 30.) The employers' payments into these funds are characterized as "contributions" throughout the various trust instruments. [R. Ex. 1, p. 72; Ex. D, p. 53.][1] Although it may be conceded

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[1] All citations to the Record refer to the printed Transcript of Record in the Court of Appeals for the Ninth Circuit.

that the parties to the present collective bargaining agreement considered the contributions to be part of the "wage package" in the industry, this fact does not convert the payments into "wages" for the purpose of priority under Section 64a(2).[2] (359 U. S. at 33.)

Furthermore, here as in *Embassy Restaurant*, the employer contributions are payable directly to trustees who hold legal title to all the funds. The employees have no right to the contributions as distinguished from the benefits accorded them under the trusts. [*E.g.*, R. Ex. 1, p. 72, Sec. 3.03; Ex. D, p. 53, Welfare Fund Trust, Sec. 4.08; Retirement Fund Trust, Sec. 4.08.] At no time, therefore, were the sums "due to workmen" as required by Section 64a(2). Accordingly, Petitioner's effort to bring its claims under the cover of *Shropshire, Woodliff & Co. v. Bush*, 204 U. S. 186 (1907), cannot succeed. There is no more of an "assignment" of wages to the Fund in this case (see Pet. pp. 10-11) than there was in *Embassy Restaurant*.

Petitioner in effect requests the Court to adopt as the governing rule the views expressed by the three dissenting Justices in *Embassy Restaurant*. The majority of the Court, however, declined to do so. Unless the decision in that case is now to be overruled, no important federal question is presented and the Petition for Writ of Certiorari should be denied.

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[2] Indeed, the present trust instruments in at least one place state that the "Payments to this Fund shall not be deemed to be wages" for various tax purposes. Record, Ex. 1, p. 72, Sec. 1.04.

Conclusion.

For the foregoing reasons, it is submitted that the petition for certiorari should be denied.

Respectfully submitted.

FRANCIS F. QUITTNER,
Attorney for Respondent.

QUITTNER, STUTMAN & TREISTER,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 637

LOS ANGELES HOTEL-RESTAURANT EMPLOYER-UNION WELFARE FUND,

Petitioner,

vs.

WILLIAM N. BOWIE, JR., Trustee in Bankruptcy,

Respondent.

REPLY BRIEF OF PETITIONER.

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WILLIAM N. BOWIE, JR., Trustee in Bankruptcy,

Respondent.

REPLY BRIEF OF PETITIONER.

Question Presented.

Did the Court below correctly hold that employer contributions to union welfare funds are not entitled to priority treatment as "wages . . . due to workmen," under Section 64(a)(2) of the Bankruptcy Act as interpreted by the *Embassy* case?

Argument.

An important Federal question is involved, namely, the correct interpretation of the case recently decided by this Court in *United States v. Embassy Restaurant, Inc.*, 359 U. S. 29.

On page 2 of Respondent's brief he states, "The present case and *Embassy Restaurant* are indistinguishable." This is an inaccurate comparison. Consider the facts:

This Case	Embassy Case
(a) 8¢ per hour worked or paid for.	Contributions bear no relation to hours, wages or productivity.
(b) A very real protective cushion of benefits, geared to this very emergency.	No cushion for the financial shock of unemployment due to bankruptcy.
(c) Stipulated by the parties to be part of the wage package.	Not proved to be part of the wage package.
(d) The stipulations of fact prove that all contributions, consistently over many years, have been derived from wage reopenings in the labor contract. [Tr. pp. 58-65, incl.; uncontroverted testimony.]	What industry generally *thinks* does not prove what these parties *did*.
(e) California law makes what the workmen agreed to here, an assignment of wages which is valid in bankruptcy.	No state law as to the validity of assignments was involved.

We concede that in both cases employer contributions are to trustees who hold legal title. In this respect only are the cases indistinguishable. But we emphasize that

the trustees held the funds *as trustees* for the exclusive benefit of the workmen.

If the other distinctions enumerated above are unimportant, why did the Supreme Court take such pains to delineate them? We can only infer that these factual differences are, therefore, vital.

Possibly very few welfare funds can present a factual situation so different from the *Embassy* case. Apparently the lower courts are uncertain as to the precise meaning of the Court and the precise application to be made of the criteria enunciated in the *Embassy* case. This case affords the Supreme Court an important opportunity to clarify its badly misunderstood decision in the *Embassy* case.

Conclusion.

For the foregoing reasons, it is submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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